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SUPREME COURT, U.S.

80-6701

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

DANIEL ROSS,

Petitioner,

v.

AMOS REED, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BARRY NAKELL
School of Law
University of North Carolina
Chapel Hill, North Carolina
(919) 933-5106

Counsel for Petitioner

QUESTIONS PRESENTED

A. Whether petitioner's failure to challenge on appeal from his pre-Mullaney v. Wilbur state court conviction of second degree murder the trial court's instructions unconstitutionally shifting to him the burden of persuasion on the issues of malice and self-defense worked a forfeiture of his right to raise the issue on federal habeas corpus.

B. Whether petitioner was denied effective assistance of counsel on appeal from his pre-Mullaney v. Wilbur state court conviction of second degree murder because his attorney failed at that time to raise the issue of the trial court's instructions shifting to him the burden of persuasion on the issues of malice and self-defense.

C. If the failure to raise a due process violation on appeal from a state court conviction generally precludes raising the issue on federal habeas corpus, whether petitioner's case meets the cause and prejudice exception to such a procedural bar.

D. Whether the state appellate court decided the merits of the due process issue even though petitioner did not expressly raise it so that there is no state procedural bar to its federal habeas corpus review.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.	1
TABLE OF CONTENTS	2
TABLE OF AUTHORITIES	3,
OPINIONS BELOW	5
JURISDICTION	5
CONSTITUTIONAL PROVISION INVOLVED.	5
STATEMENT OF THE CASE.	5
REASONS FOR GRANTING THE WRIT	
I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE HOLDING IN THIS COURT'S DECISION IN FAY V. NOIA AND RAISES THE IMPORTANT QUESTION OF THE CONTINUING VALIDITY OF THAT HOLDING.	6
II. THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF TWO OTHER CIRCUITS HOLDING THAT EVEN IF FAILURE TO COMPLY WITH A STATE RULE REQUIRING ISSUES TO BE RAISED ON APPEAL WERE GENERALLY TO CONSTITUTE A BAR TO FEDERAL HABEAS CORPUS, THE CIRCUMSTANCES OF THIS CASE MEET THE "CAUSE AND PREJUDICE" EXCEPTION TO SUCH A BAR.	8
CONCLUSION	11
APPENDIX A . . Opinion of the Court of Appeals	
APPENDIX B . . Opinion of the District Court	
APPENDIX C . . Order of the North Carolina Supreme Court in State v. Hancock, No. 105 PC (Nov. 30, 1978)	

TABLE OF AUTHORITIES

Cases — Page

Cole v. Stevenson,
620 F.2d 1055 (4th Cir.), cert. den., 101 S.Ct. 545 (1980). . . .

Collins v. Auger,
577 F.2d 1107 (8th Cir. 1978), cert. den., 439 U.S.1133(1979) . .

Cooper v. Fitzharris,
586 F.2d 1235 (9th Cir. 1978), cert. den. 440 U.S. 974 (1979) . .

County Court of Ulster County v. Allen,
442 U.S. 140 (1979). . . . . .

Davis v. United States,
441 U.S. 233 (1973). . . . . .

Estelle v. Williams,
425 U.S. 501 (1976). . . . . .

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No. 78-6059 (4th Cir. July 9, 1980). . . . . .

Fay v. Noia,
372 U.S. 391 (1963). . . . . .

Francis v. Henderson,
425 U.S. 536 (1976). . . . . .

Gardner v. Florida,
430 U.S. 349 (1977). . . . . .

Griffin v. California,
390 U.S. 609 (1965). . . . . .

Hankerson v. North Carolina,
432 U.S. 233 (1977). . . . . .

Jimenez v. Estelle,
557 F.2d 506 (5th Cir. 1977) . . . . . .

Johnson v. Zerbst,
304 U.S. 458 (1963). . . . . .

Mullaney v. Wilbur,
421 U.S. 684 (1975). . . . . .

O'Connor v. Ohio,
385 U.S. 92 (1966) . . . . . .

Ohio v. Robert,
100 S. Ct. 2531 (1980) . . . . . .

Owen v. City of Independence,
100 S. Ct. 1398 (1980) . . . . . .

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280 N.C. 398, 185 S.E. 2d 833 (1972) . . . . . .

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227 N.C. 26, 40 S.E. 2d 463 (1946) . . . . . .

State v. Hancock,
No. 105 PC (N.C. Supreme Court Nov. 30, 1978). . . . . .

State v. Hankerson,
288 N.C. 632, 220 S.E. 2d 575 (1975),
Rev'd, 432 U.S. 233 (1977) . . . . . .

TABLE OF AUTHORITIES

Cases — Page

State v. Harris,
23 N.C. App. 77, 208 S.E. 2d 266 (1974). . . . . .

State v. Johnson,
227 N.C. 587, 42 S.E. 2d 685 (1946). . . . . .

State v. Sparks,
285 N.C. 631, 207 S.E. 2d 712 (1974) . . . . . .

State v. Ross,
275 N.C. 550, 169 S.E. 2d 875 (1969) . . . . . .

Tyler v. Phelps,
622 F.2d 172 (5th Cir. 1980) . . . . . .

United States v. Brown,
48 U.S.L.W. 2698 (D.C. Cir. 1980). . . . . .

United States v. Frady
636 F.2d 506 (D.C. Cir. 1980). . . . . .

Wainwright v. Sykes,
433 U.S. 72 (1977) . . . . . .

Wynn v. Mahoney,
600 F.2d 448 (4th Cir.), cert. den., 100 S. Ct. 423 (1979) . . . .

Statutes

28 U.S.C. § 1254(1) . . . . . .

N.C. Gen. Stat., § 7A-451(a) (3) (1979 Cum Supp.). . . . . .

N.C. Gen. Stat., § 15A-1420(b) (1978). . . . . .

Rule 46, North Carolina Rules of Civil Procedure . . . . . .

Rule 10(a), North Carolina Rules of Appellate Procedure. . . . . .

OPINIONS BELOW

The opinion of the Court of Appeals is unpublished and is reproduced as Appendix A. The Order and Judgment of the District Court are not reported and are reproduced as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 1, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution provides as follows: "(N)or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Petitioner Daniel Ross was convicted at the March 17, 1969 Session of the Wake County Superior Court, after a jury trial, of second degree murder in the killing of his wife. At his trial, Ross raised the defense of self-defense and the partial defense of lack of malice. The trial court instructed the jury that Ross had the burden of proving both defenses.[1]

Ross appealed his conviction to the North Carolina Supreme Court, which affirmed it on October 15, 1969. State v. Ross, 275 N.C. 550, 169 S.E. 2d 875 (1969). Although Ross did not expressly challenge on his appeal -- which was decided more than five and one-half years before this Court's decision in Mullaney v. Wilbur, 421 U.S. 684 (1975) -- the constitutionality of the instructions imposing the burden of proof on him, the State Supreme Court held that the trial "court charged fully and correctly on the burden and intensity of the proof required to support each of the permissible verdicts of guilty . . . ." 275 N.C. at 554, 169 S.E. 2d at 878.

---

[1] The District Court, referring to page 51 of the Record on Ross' Appeal, stated that "the trial judge departed from the then customary charge and instructed the jury that the state had the burden to satisfy the jury beyond a reasonable doubt that the killing had not been in self-defense." The trial court, however, expressly told the jury, at pages 42 and 50 of the Record on Ross' Appeal, that the burden of proof on self-defense was on Ross. The point is not critical, however, because the District Court agreed that the trial court unconstitutionally imposed on Ross the burden of proof on lack of malice.

Thereafter this Court filed its opinion in Mullaney v. Wilbur, 421 U.S. 684 (1975). On June 17, 1977, this Court held in Hankerson v. North Carolina, 432 U.S. 233 (1977), that Mullaney applies retroactively, contrary to the decision of the North Carolina Supreme Court in State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975).

On December 2, 1977, Petitioner filed in the Superior Court a Petition for a Writ of Post-Conviction Review in which he challenged his conviction on the ground that it was obtained in violation of due process because the burden of proof on the issues of self-defense and lack of malice were unconstitutionally imposed upon him, relying upon Mullaney and Hankerson. On December 29, 1977, the Superior Court entered an Order denying that Petition. On January 9, 1979, Petitioner filed a Petition for Certiorari seeking review of that decision in the North Carolina Court of Appeals. By order of February 23, 1978, that Court denied the Petition.

Petitioner promptly filed a Petition for a Writ of Habeas Corpus in the United States Court for the Eastern District of North Carolina, raising the same issues. The District Court stayed the action pending the Fourt Circuit's en banc decision in Cole v. Stevenson, 620 F.2d 1055 (4th Cir.), cert. Den., 101 S. Ct. 545 (1980). On October 21, 1980, after Cole was decided by a 6-3 vote and this Court denied certiorari with three Justices voting to grant, the District Court dismissed the Petition. Petitioner timely appealed to the United States Court of Appeals, which summarily dismissed the appeal on April 1, 1981.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE HOLDING IN THIS COURT'S DECISION IN FAY v. NOIA AND RAISES THE IMPORTANT QUESTION OF THE CONTINUING VALIDITY OF THAT HOLDING.

The issues presented in this case involve the continuing validity of this Court's landmark precedent in Fay v. Noia, 372 U.S. 391 (1963), and arise as a result of this Court's decision in Wainwright v. Sykes, 433 U.S. 72 (1977). See also, Francis v. Henderson, 425 U.S. 536 (1976); Davis v. United States, 411 U.S. 233 (1973). They involve the questions of whether the rule of Wainwright v. Sykes as to the federal habeas corpus effect of a failure to comply with a state

contemporaneous objection rule at trial applies also to modify the Fay v. Noia direct holding regarding the federal habeas corpus effect of a non-deliberate failure to raise an issue on a state appeal, and, if so, of the meaning of the new "cause and prejudice" standard. The Fourth Circuit, by a 6-3 vote of the Court sitting en banc in Cole v. Stevenson, supra, held that this Court overruled Fay v. Noia in footnote 8 in Hankerson, even though six days after deciding Hankerson it expressly declared that "we leave for another day" the question of the continuing validity of Fay v. Noia. Wainwright v. Sykes, supra at 88 n.12. Three Justices voted to grant certiorari in Cole.

In Fay v. Noia, this Court held that a state criminal defendant's failure to appeal from his conviction -- as long as it was not a deliberate by-pass of state remedies -- was not a bar to federal post-conviction review.

In the present case, Petitioner did not incur any procedural defaults at trial, and he did appeal his conviction in the state courts. His appeal was completed more than five years before this Court announced its decision in Mullaney v. Wilbur, however, and Petitioner did not then expressly raise the issue that was later settled in Mullaney. As Chief Judge Haynsworth recognized in his dissenting opinion in Cole, "Fay's holding squarely fits this case" and provides that the federal courts should entertain Petitioner's habeas corpus action. 620 F.2d at 1074.

It is clear that any effort by Petitioner to have raised the issue on his pre-Mullaney appeal would have been futile. After Petitioner's conviction had been affirmed the North Carolina Supreme Court rejected similar arguments in other cases. State v. Sparks, 285 N.C. 631, 643, 207 S.E.2d 712, 719 (1974); State v. Harris, 23 N.C. App. 77, 80, 208 S.E.2d 266, 268 (1974). Moreover, after Mullaney was decided the North Carolina Supreme Court held that it did not apply retroactively. State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975), rev'd, 432 U.S. 233 (1977). Thus, the State is insisting in Petitioner's case on a futile formality. Yet, as this Court recently held: "The law does not require the doing of a futile act." Ohio v. Robert, 100 S.Ct. 2531, 2543 (1980).

Indeed, the North Carolina Supreme Court on its own motion did in fact pass upon the adequacy of the burden of proof instructions. In rejecting that contention, the District Court focused only on one sentence in which the North Carolina Supreme Court said: "The court charged fully and correctly on the burden and intensity of the proof required to support each of the verdicts of guilty." State v. Ross, 275 N.C. 550, 554, 169 S.E.2d 875, 878, (1969).

The District Court overlooked the following sentence: "While the defendant did not point out and assign as error any particular or designated portion of the charge as required by appellate rules, we have examined the charge and conclude it is in accordance with legal requirements and is unobjectionable." Id. Because the State Supreme Court thus denied Petitioner's appeal on this issue on the merits and not on the basis of a procedural default, there is no state procedural bar to its federal court review on habeas corpus. County Court of Ulster County v. Allen, 442 U.S. 140, 154 (1979). See also, Wynn v. Mahoney, 600 F.2d 448, 450 n.1 (4th Cir.), cert. den., 100 S. Ct. 423 (1979). ("We have no occasion to decide the Wainwright question since North Carolina explicitly waived that point in oral argument of this appeal.")

II.

THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF TWO OTHER CIRCUITS HOLDING THAT EVEN IF FAILURE TO COMPLY WITH A STATE RULE REQUIRING ISSUES TO BE RAISED ON APPEAL WERE GENERALLY TO CONSTITUTE A BAR TO FEDERAL HABEAS CORPUS, THE CIRCUMSTANCES OF THIS CASE MEET THE "CAUSE AND PREJUDICE" EXCEPTION TO SUCH A BAR.

This Court has recognized an exception to the federal forfeiture consequence of a state procedural lapse even where it has generally permitted the forfeiture. In Francis v. Henderson the Court said simply that the exception requires a showing of cause for the state procedural failure and "also a showing of actual prejudice." 425 U.S. at 542. In Wainwright v. Sykes, the Court noted:

> The 'cause'-and -'prejudice' exception of the Francis rule will afford an adequate guarantee, we think that the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice."

433 U.S. at 90-91. The Court said that "precise content may be given those terms by later cases." Id. at 91. This case presents the Court an occasion to elaborate on that standard, and thereby to give needed guidance to the lower courts in its application.

There was good cause for petitioner's failure to raise the issue on appeal because there was not yet an authoritative judicial decision recognizing the

validity of the issue. Petitioner did appeal on other grounds so it is evident that he was not deliberately avoiding the issue.

In O'Connor v. Ohio, 385 U.S. 92 (1966), the defendant contended "that the prosecutor's comment upon his failure to testify during his trial for larceny violated the constitutional right to remain silent." Id. at 92. He relied on Griffin v. California, 390 U.S. 609 (1965), which was decided after the defendant had exhausted his state appeals without raising the issue and was seeking review in the United States Supreme Court. This Court held "that in these circumstances the failure to object in the state courts cannot bar the Petitioner from asserting this federal right . . . . Defendants can no more be charged with anticipating the Griffin decision than can the States. . . . Thus, his failure to object to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court." Id. at 93. Cf., Owen v. City of Independence, 100 S. Ct. 1398, 1419 (1980) (Powell, J., with Burger, C.J., Stewart and Rehnquist, J.J., dissenting).

The prejudice requirement is also satisfied in this case. Prejudice flows from the erroneous standard of proof imposed on the jury's decision regarding the instructions on both malice and self-defense. The constitutionally erroneous instruction by the trial court "'raises serious questions about the accuracy'" of the jury's verdict. Hankerson v. North Carolina, supra at 243. As this Court held in Hankerson, "We do not . . . readily assume that juries fail to understand the instructions they have been receiving in North Carolina." Hankerson v. North Carolina, supra at 244 n.8.

The decision below is in direct conflict with recent decisions of the Fifth and District of Columbia circuits. In Tyler v. Phelps, 622 F.2d 172 (5th Cir. 1980), and United States v. Frady, 631 F.2d 506 (D.C. Cir. 1980),

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* In the Hankerson case itself, Hankerson did not raise the Mullaney issue on appeal to the State Court of Appeals, in his appeal papers to the North Carolina Supreme Court, or in his brief in the North Carolina Supreme Court. Three weeks after Mullaney was decided, Hankerson moved to amend the record to raise the Mullaney issue. The North Carolina Supreme Court granted that motion only eight days before oral argument in the case.

See also, State v. Hancock, No. 105 PC (N.C. Supreme Court, Nov. 30, 1978). In Hancock, the North Carolina Supreme Court awarded post-conviction relief on Mullaney grounds. In his appeal to the North Carolina Court of Appeals Hancock did not raise that issue even though Mullaney was decided while the appeal was pending. He tried to appeal further to the North Carolina Supreme Court and to raise the issue at that stage, still, like Hankerson, too late under the letter of the North Carolina rules. The North Carolina Supreme Court dismissed the appeal. A copy of its later order nevertheless granting post-conviction relief is attached as Exhibit C.

Those circuits held that "cause" for the failure to comply with a rule requiring a contemporaneous objection to jury instructions is satisfied if the defense attorney did not object because he was unaware of the grounds for doing so -- especially where the law establishing those grounds had not yet been decided. In Phelps, the Fifth Circuit held:

> "Though 'cause' was undefined in the Sykes opinion, subsequent decisions have given meaning to the term. Several courts have indicated that ineffective counsel short of that necessary to make out a Sixth Amendment claim, will satisfy the 'cause' prong. See Collins v. Auger, 577 F.2d 1107, 1110 n.2 (8th Cir. 1978) (dictum), cert. denied, 439 U.S. 1133 (1979); Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979). Jimenez v. Estelle, 557 F.2d 506, 511 (5th Cir. 1977) (dictum). We agree with the sentiment expressed in Collins v. Auger . . . that a lack of knowledge by trial counsel that the actions of the trial judge constituted a due process violation is sufficient cause for failure to object.[7]
>
> "We find this definition of the 'cause' element of Sykes to be completely consistent with the policies stated by the Sykes court. By not binding a defendant to obvious mistakes by his trial counsel we are not permitting counsel to sandbag, but only giving relief to defendants when the erroneous, nontactical decisions by counsel result in prejudice."
>
> Footnote 7: "In United States v. Brown, (D.C. Cir. 1980) (48 U.S.L.W. 2698) in the context of discussing the 'cause' prong of Rule 12, Fed. R. Crim. P., the court stated:
>
> > "'Even when counsel's performance is generally competent, however, he may, through oversight or ignorance, fail to present a substantial constitutional claim. Binding a defendant to the materially deficient judgment of his attorney would be a senseless penalty in most cases because most defendants lack the legal sophistication to monitor their attorney's performance.'"

622 F.2d at 172. Frady was a federal, not a state case. Otherwise, it is squarely on point with the present case because it too involved the application of a new decision after the defendant's trial holding that the instructions given at the trial, without objection, were erroneous. The Court ruled:

> "At the time of his trial, the erroneous instructions were standard. Thus, appellant's counsel had every right to assume that any objection to the instructions would have been futile. To rule otherwise would be to suggest that trial counsel should object to all jury instructions in anticipation of changes in the constitutionality of jury instructions. Such a suggestion borders on the absurd."

636 F.2d at 512. Of course, in the present case, petitioner's attorney did not in fact anticipate the Mullaney decision. See also, Gardner v. Florida, 430 U.C. 349, 361 (1977):

> "Nor do we regard this omission by counsel [the failure to request access to the full pre-sentence report] as an effective waiver of the constitutional error in the record. . . . (T)here is no basis for presuming that the defendant himself made a knowing and intelligent waiver, or that counsel could possibly have made a tactical decision not to examine the full report."

CONCLUSION

Like most federal habeas corpus actions since Stone v. Powell, 428 U.S. 465 (1976), the present case raises issues that involve the factual integrity of the adjudication of guilt in the state court. Although petitioner was concededly convicted at an unfair trial in which due process violations substantially impaired the truth-finding process, the Court of Appeals held that his conviction should be upheld simply because he did not raise the issue on appeal, even though he did appeal and even though he did raise the issue in the state courts as soon as this Court decided Mullaney and held that it applied to his trial. That decision is contrary to the holding of Fay v. Noia, and is not supported by any federally cognizable policy or any legitimate state interest.

For the foregoing reasons, petitioner respectfully requests that the Court issue a writ of certiorari to review the judgment of the Fourth Circuit.

Respectfully submitted,

Barry Nakell

Barry Nakell

School of Law
University of North Carolina
Chapel Hill, North Carolina
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that I have served one copy of the foregoing Petition for Writ of Certiorari and Motion for Leave to Proceed in Forma Pauperis, by mailing them, first class postage prepaid, addressed as follows:

Mr. Richard N. League
Assistant Attorney General
P.O. Box 629
Raleigh, N.C. 27602

Date: May 19, 1981

Barry Nakell
Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

DANIEL ROSS,

Petitioner,

vs.

AMOS REED, etc., et al.,

Respondents.

No. 78-62-HC

O R D E R

273

This petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is before the court for a ruling after having been stayed pending the Fourth Circuit's decision in Cole v. Stevenson, 620 F.2d 1055 (4th Cir. 1980). After Cole the parties were ordered to file written arguments applying the Cole opinion to this case. The parties have so responded and the case is now ripe for decision.

Petitioner Ross was convicted of first-degree murder in 1968. On direct appeal he excepted to certain aspects of the trial judge's charge to the jury. In his Assignment No. 9, he contended that the trial court should have charged the jury as to the law of involuntary manslaughter. In his Assignment No. 10, he contended that the court did not properly define self-defense. (Record on Appeal to N. C. Supreme Court, p. 57). He did not except to that portion of the charge where the judge placed upon the defendant the burden to rebut a presumption that an intentional killing is done unlawfully and with malice. (Record on Appeal, p. 42.) Furthermore, the trial judge departed from the then customary charge and instructed the jury that the state had the burden to satisfy the jury beyond a reasonable doubt that the killing had not been in self-defense. (Record on Appeal, p. 51.) In considering petitioner Ross' appeal of jury instruction errors, the North Carolina Supreme Court stated: "The court charged fully and correctly on the burden and intensity of the proof required to support each of the permissible verdicts of guilty; and that the failure of the state to carry the burden required a verdict of not guilty." State v. Ross, 275 N.C. 550, 554, 169 S.E.2d 875 (1969).

EXHIBIT A

Ross contends that these assignments of error adequately raised the Mullaney issues on his direct appeal to permit him to avoid the procedural default bar announced in Cole. It is clear from the record, however, that he did not clearly present the Mullaney issues as required by the North Carolina Supreme Court Rule 19 (3). See, e.g., State v. Jackson, 284 N.C. 383, 200 S.E.2d 596 (1973), motion for reconsideration denied, 293 N.C. 260, 247 S.E. 2d 234 (1977). The issue presented is whether the North Carolina Supreme Court, by addressing Ross' contentions in such a broad fashion, waived its own rule and considered the Mullaney issue sua sponte.

The North Carolina Supreme Court has at times waived its rule that asserted errors be clearly presented and has proceeded to the merits of asserted errors in jury instructions where those errors had not been clearly presented. E.g., State v. Freeman, 295 N.C. 210, 244 S.E.2d 680 (1978); State v. Rigsbee, 285 N.C. 708, 208 S.E.2d 670 (1974). In such cases the Supreme Court's waiver is explicitly acknowledged. In the present case the Supreme Court did not explicitly waive its rule and cannot reasonably be said to have actually considered the Mullaney issue despite the broad language of the holding.

Accordingly, plaintiff's motion to file exhibits is granted, defendant's motion to dismiss is granted, and this action is hereby dismissed.

SO ORDERED.

F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

October 21, 1980.

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 80-8344

Daniel Ross,

Appellant,

v.

Amos Reed, etc. and
Attorney General of the
State of North Carolina,

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. F. T. Dupree, Jr., District Judge.

Submitted: January 27, 1981 Decided: April 1, 1981

Before HAYNSWORTH, Chief Judge; WINTER and ERVIN, Circuit Judges.

(Daniel Ross, Appellant Pro Se. Richard N. League, Assistant Attorney General, for the Appellees.)

EXHIBIT B

PER CURIAM:

A review of the record and the district court's opinion discloses that an appeal from its order refusing habeas corpus relief pursuant to 28 U.S.C. § 2254 would be without merit. Because the dispositive issues recently have been decided authoritatively, we deny a certificate of probable cause to appeal, dispense with oral argument, and dismiss the appeal on the reasoning of the district court. Ross v. Reed, C/A No. 78-62-HC (E.D.N.C., Oct. 22, 1980).

DISMISSED.

No. 105 PC

TWENTY-SECOND DISTRICT
DAVIDSON COUNTY

SUPREME COURT OF NORTH CAROLINA

Fall Term 1978

* * * * * * * * * * * * * * * * *

STATE OF NORTH CAROLINA	)	
	)	ORDER AWARDING NEW TRIAL
v	)	UPON DEFENDANT'S PETITION
	)	FOR FURTHER REVIEW
BILLY LEE HANCOCK	)	

Defendant petitioned Davidson Superior Court for post-conviction relief on the ground that at his trial for second degree murder at the 17 March 1975 session of that court the trial court unconstitutionally placed the burden of proving the absence of malice in order to reduce his crime to manslaughter, and self-defense in order to excuse it altogether upon the defendant. From a denial of this petition defendant applied for a writ of certiorari to the Court of Appeals which was likewise denied on 9 October 1978. He petitions us for further review of that denial.

The issue of self-defense was properly presented at defendant's trial. The trial judge in his jury instructions placed the burden of proving this defense upon the defendant. Although defendant did not assign this as error in his appeal to the Court of Appeals, which found no error in his trial, State v. Hancock, 28 N.C. App. 149, 220 S.E. 2d 167 (17 December 1975), defendant did seek to appeal to this Court on the ground, among others, that the jury instructions in his trial violated Mullaney v. Wilbur, 421 U.S. 684 (9 June 1975) as interpreted in State v. Hankerson, 288 N.C. 632, 220 S.E. 2d 575 (17 December 1975). Having determined in Hankerson that the Mullaney rule was not retroactive, we allowed the state's motion to dismiss defendant's appeal. In Hankerson v. North Carolina, 432 U.S. 233 (1977), the United States Supreme Court determined that we had erred in declining to hold the Mullaney rule fully retroactive.

EXHIBIT C

Inasmuch, therefore, as defendant did seek to raise on direct appeal to this Court, and before the judgment against him was final, the question of the constitutionality of the trial judge's instruction placing the burden on defendant to prove self-defense and the Court being of the opinion that in light of Mullaney v. Wilbur, supra, and Hankerson v. North Carolina, supra, his appeal on that ground should have been allowed and defendant awarded a new trial, the Court having permitted the defendant Hankerson to raise the same question for the first time in this Court, State v. Hankerson, supra, now, therefore, it is

ORDERED by the Court in conference that defendant's petition for further review be allowed for the sole purpose of further ordering that defendant be and he is hereby awarded a new trial. See orders earlier entered in various cases at 293 N.C. 259-263 (1977).

This the 29th day of November, 1978.

For the Court

The foregoing order is issued over my hand and the seal of the Supreme Court this 30th day of November, 1978.

John R. Morgan
Clerk of the Supreme Court
of North Carolina

cc: North Carolina Court of Appeals
Mr. Charles F. Lambeth, Jr., Attorney at Law
Ms. Kaye R. Webb, Associate Attorney
Mr. Hugh Shepherd, Clerk of Superior Court
Mr. H. W. Zimmerman, Jr., District Attorney

A TRUE COPY
JOHN R. MORGAN
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA
DEPUTY CLERK
November 30, 19 78

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SUPREME COURT, U.S.

No. 80-6701

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

DANIEL ROSS,

Petitioner,

v.

AMOS REED, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner

Pursuant to Rule 22.6 of the Supreme Court Rules, Petitioner Daniel Ross files this Supplemental Brief to call attention to this Court's action on April 20, 1981, granting certiorari in Engle v. Isaac, No. 80-1430, which raises one of the issues presented in this case.

The issue common to Engle and to this case is whether the "cause" requirement of Wainwright v. Sykes is satisfied where, at the time (in Engle, at trial; in this case, on appeal) that state law required the issue to be raised, there was not yet an authoritative judicial decision recognizing the validity of the issue or any basis for counsel to anticipate it. That issue is better presented in this case than in Engle because the new law, this Court's decision in Mullaney v. Wilbur, was not decided until five and one-half years after Petitioner Ross' appeal was concluded. In Engle, on the other hand, Mullaney had been decided by the time of the petitioners' trials, although it had not yet been applied to the defense of self-defense by the state courts.

The first issue presented by Petitioner Ross -- whether Wainwright v. Sykes applies to the failure to raise an issue on appeal as well as at trial and therefore overrules the holding in Fay v. Noia -- is not part of the Engle case. In Engle, the three petitioners failed to comply with a state rule requiring contemporaneous objection at trial. Ross committed no such procedural default.

The second issue in the Engle case -- whether it violates due process for a state to make self-defense an affirmative defense and put the burden of persuasion on the defendant -- is not necessarily presented in Ross' case. At Ross' trial the court instructed the jury that Ross had the burden of proving lack of malice as well as self-defense, thus presenting a clear violation of Mullaney v. Wilbur.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served one copy of the foregoing Supplemental Brief in Support of Petition for Writ of Certiorari by mailing it, first class postage prepaid, addressed as follows:

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

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No. 80-6701

****

DANIEL ROSS,

Petitioner

v.

AMOS REED, Warden,
ET AL.,

Respondents

****

BRIEF OF THE RESPONDENTS, AMOS REED, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

****

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I N D E X

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	1
Legal Provisions	1
Statement of the Case	2
Statement of the Facts	3
Conclusion	10

TABLE OF CASES AND OTHER LEGAL AUTHORITIES

Berrier v. Engle, 583 F.2d 575 (6th Cir. 1978)	7
Cole v. Stevenson, _____ US _____, 66 LEd 2d 301 (November 17, 1980)	7
Cole v. Stevenson, 620 F.2d 1140 (4th Cir. 1980)	7,9
Cooper v. Fitzharris, 586 F.2d 1325 9th Cir. 1978)	8
Engle v. Issac, 29 CrL 4021	8
Estelle v. Williams, 425 US 510 (1976)	9
Evans v. Magio, 557 F.2d 430 (5th Cir. 1977)	7
Fay v. Noia, 372 US 361 (1963)	9
Gillihan v. Rodriguez, 551 F.2d 1182 (9th Cir. 1977)	8
Haywood v. Stone, 527 F.2d 256 (9th Cir. 1975)	8
In Re Winship, 397 US 358 (1970)	9
McMann v. Richardson, 397 US 759 (1970)	9
Marzullo v. Maryland, 561 F.2d 54 (4th Cir. 1977)	10
Marzullo v. Marland, 435 US 1011 (1978)	10
Mullaney v. Wilbur, 421 US 684 (1975)	7,8
Sandstrom v. Montana, 442 US 510 (1979)	8
State v. Ross, 275 NC 550 (1969)	5
State v. White, 274 NC 200 (1964)	6
Supreme Court Practice, Stern and Gressman, (5th Ed. 1978)	8
Wainwright v. Sykes, 433 US 72 (1977)	7

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OPINION BELOW

JURISDICTION

QUESTIONS PRESENTED

Pursuant to Rule 34 of the Rules of the Supreme Court, these items are omitted.

LEGAL PROVISIONS

United States Constitution, Amendment VI. In all criminal prosecutions, the accused shall enjoy the right... to have assistance of counsel for his defense.

United States Constitution, Amendment XIV. No state shall... deprive any person of life, liberty or property, without due process of law....

NCGS §1-180. Judge to explain law, but give no opinion on facts. -- No judge, in giving a charge to the petit jury in a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case. He shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; provided the judge shall

give equal stress to the State and defendant in a criminal action.

Rule 28(a). Briefs: Function and Content

(a) Function. The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned. Similarly, questions properly presented for review in the Court of Appeals but not then presented and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court are deemed abandoned.

STATEMENT OF THE CASE

This petition seeks review of the denial of an application for a writ of habeas corpus by the United States District Court for the Eastern District of North Carolina, Honorable Franklin T. Dupree, Judge Presiding, Ross v. Reed, 78-62-HC, dismissed 23 October 1980. The United States Court of Appeals for the Fourth Circuit affirmed the District Court on 1 April 1981 in an unpublished decision, Ross v. Reed, 80-8344. The underlying criminal case is a first degree murder conviction obtained in the Superior Court of Wake County North Carolina in March 1969, case number 68 CR 4266, affirmed on appeal, State v. Ross, 275 NC 550, filed 15 October 1969. The issues in this petition are procedural and arose during the course of the federal proceedings. As they deal with federal habeas corpus law, however, there has been no occasion and will be none for the state courts to deal with them. The substantive issues to which they relate were presented in a state court post-conviction proceeding on December 2, 1977 but this was denied on December 29, 1977 and appellate review

was declined on January 9, 1978.

STATEMENT OF THE FACTS

Petitioner was tried for and convicted of first degree murder, the elements of which in North Carolina are the usual ones - the unlawful killing of another with premeditation, deliberation and malice. The state's case showed that he shot and killed his wife in the course of the second of two separate shooting incidents separated by his leaving the room where the killing occurred, going outside to reload his weapon, then returning to the place of the killing. Petitioner's evidence was that if he killed, he did so in self-defense for he shot at his wife after she had slashed him with a knife and later shot her boyfriend who approached him with something in his hand and at that time possibly hit his wife unintentionally rather than the boyfriend who was the actual assailant. He also claimed the unrecognized offense of "irresistible impluse". The trial judge, Honorable Leo Carr, charged that petitioner was presumed innocent and that the state had the burden of proof in the case. In conjunction with his instructions on second degree murder, Judge Carr charged that:

> The court instructs you that murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation.
>
> Malice is not only hatred, ill-will or spite, as it is ordinarily understood, but it also means that condition of mind which prompts a person to intentionally take the life of another without just cause, excuse or justification. It may be shown by evidence of hatred, ill-will or dislike and it is implied in law from the intentional killing with a deadly weapon; and a pistol or a gun is a deadly weapon. (R p 36).
>
> *****
>
> Now in respect to [whether or not he is guilty of murder in the second degree] the court instructs you that in a case where a person is killed as a result of a gunshot wound fired intentionally but where the state has satisfied you beyond a reasonable doubt that the defendant intentionally assaulted the deceased with a deadly weapon and that such assault caused her death there are two presumptions that arise in

favor of the state: One, that the killing was unlawful; Two, that it was done with malice; and the burden then shifts to the defendant under those circumstances to satisfy the jury, not beyond a reasonable doubt nor by the greater weight of the evidence, but to satisfy the jury that the killing was not done with malice if he would acquit himself of a charge of murder in the second degree... (R p 42)

Judge Carr then continued with regard to self-defense in the event the jury found that petitioner killed his wife on the first occasion he shot at her:

....if he would exonorate himself and show that the killing was not unlawful then the burden of proof is upon him to satisfy the jury, as the court has indicated not beyond a reasonable doubt nor by the greater weight of the evidence but to satisfy the jury that the killing was done under some, for some reasor recognized by the law as justifiable; and here he relies on self-defense; contends that you should find that he did not kill her except in his proper self-defense within the meaning of that term as it has been defined to you by the court. (R p 42)

This was followed by an instruction in the event the jury found petitioner killed his wife on the second occasion he fired the pistol:

If you find that he did not shoot at his wife and shot at McAllister, then the court instructs you that the burden would be upon the state to satisfy you under those circumstances beyond a reasonable doubt that he intentionally assaulted McAllister if he shot at McAllister with a deadly weapon, to wit: a pistol and he had no lawful right to do so, and in doing so, the bullet hit his wife, then he would be guilty if the state has satisfied you beyond a reasonable doubt that he shot at McAllister trying to hit him and did it with malice and did not under circumstances showing that he did not have the right to do it under the doctrine of self-defense as that term has been defined and explained by the court, then in that event he would be guilty of murder in the second degree. If you are satisfied beyond a reasonable doubt that he shot at McAllister with no lawful right to do so and with no - under those circumstances that made - that did not make the doctrine of self-defense between him and McAllister apply in the case, then under those circumstances it would be your duty, if you find those to be the facts and you were satisfied of those facts beyond a reasonable doubt, the burden being upon the state to so satisfy you he would be guilty of murder in the second degree, and under those circumstances in that particular connection, that in his explanation of his shooting at McAllister, if the State has satisfied you - failed to, to satisfy you beyond a reasonable doubt that he did shoot at McAllister and did it with malice then under those circumstances he would not be guilty

> of murder in the second degree under those circumstances. (R p 47)

Judge Carr later concluded by his charge again putting the burden of proof on the state with regard to both second degree murder and self-defense in the event petitioner was found to have shot his wife while defending himself against McAllister, while putting the burden of proof on petitioner to satisfy the jury of self-defense in the event that they found he killed his wife during the course of his first assault. (R p 51).

Objections were not taken at trial to the instructions, however, there was no state law requirement at that time that instructions on major points of law in a case had to be objected to at trial in order for them to be reviewed on appeal. Additionally, the instructions were not assigned as error on appeal insofar as the burden of proof was concerned for, under the law of North Carolina at the time, the burden of proof was properly placed on the petitioner. However, the tenth Assignment of Error related to self-defense instructions and was as follows:

> (10) ASSIGNMENT NO. 10 The court below erred in failing to apply the law to the evidence as required by North Carolina G.S. §1-180 in that it did not properly charge the jury as to the doctrine of self-defense, being asserted by the defendant, i.e., that the defendant was in a place where he had a legal right to be; that the defendant was without fault in bringing on the difficulties; that the deceased had ill-will toward him; and that the deceased advanced on him and stabbed him.

The briefs are not a part of the record in this case and it is unclear from the Supreme Court's opinion whether or not this assignment was carried forth in the brief as the court states in its opinion that "the defendant did not point out and assign as error any particular or designated protion of the charge as required by the appellate rules", State v. Ross, 275 NC 550 (1969). This is somewhat ambigious in that it could mean either that

nothing about the instructions was brought forth for argument or that something was brought forth but not in accordance with the rules. Ordinarily, either would result in a "abandonment" of an issue under North Carolina's Rules of Appellate Procedure, Rule 28(a). This, in turn, would cost petitioner his state remedy, as matters of record which could be reviewed on appeal may not be reviewed in a post-conviction proceeding, State v. White, 274 NC 200 (1964). However, in the course of its opinion, the Supreme Court, while discussing petitioner's argument that the court erred in failing to submit the possible verdict of involuntary manslaughter, stated that Judge Carr "charged fully and correctly on the burden and intensity of the proof required to support each of the permissible verdicts of guilty" and that despite the fact "the defendant did not point out and assign as error any particular or designated portion of the charge..., we have examined the charge and conclude that it is in accordance with legal requirements and is unobjectionable", Id. at 554.

In February 1979, petitioner then challenged his conviction in the federal court habeas action which forms the basis of this petition. His particular contention was:

> The court charged the jury "there are two presumptions that arise in favor of the state: One, that the killing was unlawful; Two, that it was done with malice; and the burden then shifts to the defendant, etc. (R p 42). Hence placed upon the petitioner burdens of proof later held by the United States Supreme Court to be violative of due process, Mullaney v. NC, 421 US 684 (1966) which ruling was given retroactive effec effect in Hankerson v. NC, 421 US 684 (1977) and appears at (R p 42). [sic]

His traverse in the federal action also raised the matter of burden of proof on self-defense. Both issues had been raised in his post-conviction application but review of them had been denied because the application "...stated no grounds for relief under the post-conviction act". Respondents pled as defenses against these claims procedural

forfeiture resulting from the failure to raise the issues on appeal and, in conjunction with the presumptions, that they were permissible under Mullaney v. Wilbur, 421 US 684 (1975) and did not affect the outcome of petitioner's case because they were used in conjunction with the charge on second degree murder of which petitioner was not convicted. On petitioner's motion, his case was held in abeyance pending decision in a Fourth Circuit case in which the validity of respondent's procedural default argument was at issue. When that decision was finally made, it upheld respondent's procedural forfeiture argument. Petitioner then filed a supplemental pleading by which he contended that the North Carolina Supreme Court's statements, mentioned above in conjunction with his claim that involuntary manslaughter should have been the subject of a charge, were in fact a ruling on the subject matter of his complaint and therefore prevented a forfeiture.

REASONS THE WRIT SHOULD NOT ISSUE

The writ should not be granted to review petitioner's Issues A and C - forfeiture and the meaning of the Wainwright v. Sykes cause and prejudice exception - because the court has previously declined to grant it in Cole v. Stevenson, _____ US _____, 66 LEd 2d 301 (November 17, 1980) to review the decision by the United States Court of Appeals for the Fourth Circuit in that case, 620 F.2d 1140 (1980). Cole involved the same issues as this case and the decision in this case is based on it. In Cole, Mr. Nakell was also the attorney for the inmate; the undersigned represented the respondents; and there was agreement between the parties that the issues were reasonably important and the subject of a two - one conflict in the circuits, compare Berrier v. Egeler, 583 F.2d 575 (6th Cir. 1978) with Evans v. Magio, 557 F.2d 430 (5th Cir. 1977) and Cole v. Stevenson, supra. Nothing has changed since that time except the court now has these

issues before it in Engle v. Issac, 80-1430, 29 CrL 4021 on what appear to be similar facts, although as pointed out by petitioner, the procedural default argued in that case may involve an at-trial action rather than failure to present the issue on appeal.

The writ should not be granted to review petitioner's Issue B - ineffective assistance of counsel - because this issue was also raised in Cole and found not not worthy of review there. This is because it is elementary that an lawyer is not ineffective for failing to anticipate changes in the law, see e.g. Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978), Haywood v. Stone, 527 F.2d 256 (9th Cir. 1975), Gillihan v. Rodriguez, 551F.2d 1182 (8th Cir. 1977) and certainly this would be the case here, as even In Re Winship, 397 US 358 (1970) on which Mullaney v. Wilbur, supra, was based had not been decided at the time of the appellate decision in petitioner's case on 15 October 1969 and it was not made clear until years later in Sandstrom v. Montana, 442 US 510 (1979) that Winship affected the presumptions involved in this case.

The writ should not be granted to review petitioner's Issue D - the North Carolina Supreme Court's alleged review of petitioner's question even though it was not raised there - because it is frivolous. As Judge Dupree found at the District Court level, there is simply no basis on which it can be concluded that the North Carolina Supreme Court considered the question of the applicability of a then undecided constitutional principle and whether or not it necessitated a change in North Carolina state law. Reference to Stern and Gressman, Supreme Court Practice, p. 222, 223 (5th Ed. 1978) shows that this is correct for there it is said:

> Where the highest state court assumes or holds the federal question is properly before it and then proceeds to consider and dispose of that issue, the Supreme Court's concern with the proper raising of the federal question in the state court disappears.....

*****

> A written opinion filed by the highest state court is part of the record before the Supreme Court. It is of obvious importance in determining whether the state court actually considered the federal question to be raised by it.... The majority of opinion, if it is to be helpful in this connection, must explicitly or implicitly recognize the presence of a federal question and render a decision thereon.

It is obvious that the above could not have occurred in this case.

Nothing petitioner argues to the court in support of his petition changes the above. First, the Fourth Circuit in Cole v. Stevenson does not seem to respondent to have held or stated that Fay v. Noia, 372 US 361 (1963) was overruled by Wainwright but only that Wainwright, as opposed to Fay, applied to the facts of this case. This is unremarkable because in Fay, the basis of the decision was that the prisoner lost his state appellate remedy because he was coerced into giving it up in its entirety, and in petitioner's case he made use of his state appellate remedy rather than being coerced into giving it up. Second, the fact that petitioner felt an objection would not have been honored in state court is of no particular importance for in such cases as McMann v. Richardson, 397 US 759 (1970), Estelle v. Williams, 425 US 510 (1976) the lawyers involved likewise thought this but failed to object without any review - saving consequences. Third, petitioner's assertion that "....the State Supreme Court thus denied petitioner's appeal on this issue on the merits and not on the basis of procedural default" begs the question because from all appearances there was no issue raised by petitioner on this matter in that court. Fourth, the reliance on a conflict in the circuits on the sufficiency of cause for the exception to Wainwright to operate is misplaced because that conflict does not appear to be based on an interpretation of Wainwright but instead appears to stem from a conflict in the circuits on what constitutes ineffective assistance

of counsel. The Fourth Circuit, in Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977) has shifted its focus from the trial as a whole to the particular error asserted, with its concern being whether or not it was "so flagrant that a court could conclude that it resulted from negligent or ignorance rather than from informed, professional deliberation", Id. at 544 . However, the other two circuits whose holdings are claimed to conflict with that of the Fourth Circuit, still have tests relating to ineffective assistance of counsel which deal with the trial as a whole - the "reasonably effective counsel" standard, see cases cited in the dissent to the denial of certiorari in Marzullo, 435 US 1011 (1978). This has resulted in the unusual concept in those circuits of a non-Sixth Amendment ineffectiveness of counsel which, of course, should someday be rejected by the court. However, that issue is only tangentially presented by petitioner's application and by this case as a whole. Therefore, petitioner's arguments should not be accepted as a basis for the exercise of the Court's discretion to review this case.

CONCLUSION

For the reasons set out above, respondents urge that the Court not issue a writ of certiorari to review the decisions previously made in this case.

This 4 day of August, 1981.

Respectfully submitted,

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